In the Matter of:

CCXpress Inc. d/b/a PBX Logistics USA,
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION


Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).


I, Administrative Law Judge Larry W. Price, received the Appeal File, containing Employer’s request for review on April 9, 2021. The Solicitor elected not to file a brief in this matter. For the reasons set forth below, I affirm the CO’s denial of temporary labor certification.

STATEMENT OF THE CASE


On February 9, 2021, the CO issued a Notice of Deficiency, listing six deficiencies. (AF 204-214). The first deficiency listed was Employer’s “[f]ailure to establish the job opportunity as temporary in nature,” as required by 20 C.F.R. §§ 655.6(a)–(b). The CO wrote that, in order for Employer to establish its alleged peak load need for long haul truck drivers, Employer must establish that (1) it regularly employs permanent workers to perform those services or labor at the place of employment, (2) it needs to temporarily supplement its permanent staff due to a seasonal or short-term demand, and (3) the temporary additions to staff will not be part of Employer’s regular operation. The CO noted that Employer indicated it “currently employs 20 truck drivers to perform the long-distance refrigerated trucking services… However, due to short-term demand caused by various factors, the employer needs to supplement its permanent staff on a temporary basis.” Employer mentioned national shortage of truck drivers. However, the CO stated that this information did not support nor explain how Employer determined its need for 15 additional drivers. The CO wrote Employer did not explain what events directly caused the seasonal or short-term demand that lead to Employer’s peak load need from April 1, 2021 to January 1, 2021, emphasizing that labor shortage does not justify such a need. (AF at 207).

To remedy the first deficiency, the CO required Employer to submit:

1. Payroll reports and the number/pattern of deliveries over the course of the previous two calendar years 2019-2020 that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, Truck Drivers, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
2. An explanation of the data in submitted payroll documentation;
3. A summarized monthly list from CCXpress Inc. dba PBX Logistics USA of the previous two calendar years and up-to date of current year that indicates the number of truck loads that leave the main worksite for deliveries to other locations for this temporary seasonal truck driving need; and
4. The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer’s response must include, but is not limited to, the contracts signed with the employer’s clients, and a summarized report from these clients that supports the temporary need that occurs between April and January as part of the need for seasonal truck driving by CCXpress Inc. dba PBX Logistics USA.

References to the Appeal File will be abbreviated with an “AF” followed by the page number.
The second deficiency was Employer’s “[f]ailure to establish temporary need for the requested number of workers,” as required by 20 C.F.R. §§ 655.11(e)(3)–(4). The CO stated that Employer failed to explain how it determined its need for 15 truck drivers. (AF at 208). To remedy the second deficiency, the CO required Employer to submit supporting evidence and documentation to establish that the requested 15 workers is a true and accurate, representing a bona fide job opportunity. The CO wrote that Employer’s response must include at least the following:

1. An explanation with supporting documentation of why the employer is requesting 15 Truck Drivers for Kent, Washington during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 15 Truck Drivers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years 2019-2020 that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
4. An explanation of the data in submitted payroll documentation; and
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

The third deficiency involved the number of worksites listed on Employer’s application. The CO explained that although 20 C.F.R. § 655.15(f) allows an application to include multiple worksites within one area of employment, Employer indicated multiple worksites that are significantly distant from one another. (AF at 209). The CO wrote that it did not appear that the worksites are within the same area of intended employment. To remedy the defect, the CO required Employer to amend its ETA Form 9142 and provide specified additional evidence. (AF at 210).

The fourth deficiency was listed as the “[f]ailure to satisfy the obligation of H-2B employers” under 20 C.F.R. § 655.20(e). The CO observed that Employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Specifically, noted the CO, Employer indicated that it requires truck drivers to have 24 months of experience in long haul truck driving, which is twice the normal and accepted 12-month experience level. (AF at 210). To fix this deficiency, the CO required Employer to either provide evidence that the qualifications are bona fide and consistent with the normal and accepted qualifications imposed by non-H-2B employers, or amend its experience requirement throughout its application. (AF at 211).

The fifth deficiency listed was Employer’s “[f]ailure to submit an acceptable job order,” pursuant to 20 C.F.R. §§ 655.16–655.18. While Employer did file a copy of its job order with its application to the CNPC, the job order did not include certain required information, which the CO
specified. (AF at 211–12). The CO also advised Employer of new Department-required transportation and subsistence rates as well as a list of 17 criteria each job order must meet. (AF at 212–13). The CO gave specific instructions on how to remedy this deficiency. (AF at 213).

The final deficiency listed was Employer’s “[f]ailure to submit a complete and accurate ETA Form 9142,” as required by 20 C.F.R. § 655.15(a). Employer left the “City” field blank in Appendix A, Item I. The CO required Employer to clarify the city name(s) to be entered into that field, and grant the Department permission to complete the field on Employer’s behalf. (AF at 214).


Employer states that it experienced great difficulty recruiting truck drivers, and has struggled to maintain its pre-pandemic workforce. Employer stated that it had eleven full-time drivers and three subcontractors in August 2019, compared to seven full-time drivers and three subcontractors in August 2020. Employer blames the difference on the “severe shortage of available truck drivers in the U.S.” (AF at 63).

Employer submitted four support letters from client. Ocean Beauty Seafoods’ Senior Distribution Manager wrote:

We are aware that there is a shortage of truck drivers in the industry which has negatively impacted the level of service CCXpress is able to provide, especially during our peak months which usually last from April to January. For the moment, unless CCXpress is able to recruit additional truck drivers from abroad, the company’s shortage of truck drivers will likely continue until January 2022.

(Pacific Seafood’s purchasing manager stated that their peak season occurs between April and January. (AF at 97). Both Westport Seafood, Inc. and Peterpan Seafood Co. stated that they believed Employer’s shortage would continue until January 2022. (AF at 99, 101).

Employer’s monthly truckload deliveries for years 2019 and 2020 is summarized as follows:

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<th>2019 Loads</th>
<th>2020 Loads</th>
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<td>January</td>
<td>168</td>
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<td>February</td>
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<td>March</td>
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<td>April</td>
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<td>July</td>
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On March 22, 2021, the CO issued a Final Determination denying Employer’s Application for Temporary Employment Certification. (AF 34–42). After review of Employer’s response to the Notice of Deficiency, the CO found the response was inadequate with respect to two deficiencies and denied Employer’s application. (AF at 35). The two outstanding deficiencies were Employer’s (1) failure to establish the job opportunity as temporary in nature, and (2) failure to establish temporary need for the number of workers requested.

The CO found that Employer’s response failed to establish the temporary nature of the job opportunity as required by 20 C.F.R. §§ 655.6(a), (b). First, the CO notes, that Employer’s submitted payroll charts show that not all workers work full, 40-hour work weeks. The CO refutes Employer’s claim that it had eleven full-time drivers in August 2019 as compared to seven in the following year, pointing to the 2019 payroll report showing that Employer had only seven full-time drivers in August 2019 as well. (AF at 39). Second, the CO refutes Employer’s claimed peak season between April and late-December. The CO stated that Employer’s 2020 payroll appeared to show peak need only in August, October, and December. In 2019, Employer logged more deliveries in February (125 truckloads) than in June (121 truckloads). In 2020, Employer logged more deliveries in February (116 truckloads) than in September or October (110 and 113 truckloads, respectively). The CO pointed to the fact that February is allegedly outside of Employer’s peak season. (AF at 40).

The CO also found that Employer’s response failed to establish temporary need for fifteen drivers as required by 20 C.F.R. §§ 655.11(e)(3), (4). The CO states that Employer’s 2019–2020 payroll failed to provide information regarding the number of hours worked or number of truckloads delivered by subcontractors, which made it unclear and difficult to determine the workload for temporary workers. Additionally, the CO acknowledged the support letters from clients, but argued that the lack of written contracts providing information about what those clients’ requirements failed to support Employer’s request for temporary labor. (AF at 42).

On April 6, 2021, Employer timely requested administrative review. (AF 1–33). In his request, Employer argues that the business was previously a shell until purchased by the current owners, and that it did not have any operations until February 2019. The letter states that “due to the time sensitive nature of the product, [the seafood industry] does not normally use written contracts or letters of intent that would memorialize an agreement.” (AF at 3). Employer also argues that its requested 15 temporary drivers is based on one the Employer’s governor’s experience in the seafood industry. (AF at 4).
LEGAL STANDARD

The standard of review in H-2B cases is limited. A reviewing judge may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

DISCUSSION

As set forth above, the CO denied Employer’s application for failure to establish a temporary, seasonal need, and for failure to establish its need for 15 truck drivers. Based on my review of the record, I conclude the CO’s findings support their ultimate decision.

Under 20 C.F.R. §§ 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is temporary. Temporariness can by shown by establishing a one-time occurrence, seasonal need, peak load need, or intermittent need. Here, Employer requested 15 long haul truck drivers between April 1, 2021 and January 1, 2022. Employer alleged that the need was temporary due to a peak load season. Employer claims that April through January is its seasonal peak load, and attempts to support this claim with various clients’ letters. Employer has failed to establish more than an arbitrary seasonal need.

The clearest evidence of seasonal need is Employer’s list of monthly truckloads, which still fall short of establishing the seasonal need. In its request for administrative review, Employer states that it was previously a shell company until purchased by its current owners, and that it has only had operations since 2019. Accordingly, there is not a lengthy history establishing a reoccurring season. Employer attempts to establish its peak season through monthly truckload summaries, support letters from clients, and payroll reports.

Although several clients wrote support letters attesting to the April to January peak season, there are no written contracts supporting those claims. The support letters amount to little more than a promise to continue to do business despite the national shortage of truck drivers.

Employer also submitted monthly truckload deliveries for its two operational years. Employer’s monthly truckloads in 2019 and 2020 are as follows:

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Employer claims that its peak season occurs annually between April and December, and excludes January, February, and March. The purported annual season is not supported by the monthly truckload summaries. Employer’s 2020 figures were undoubtedly impacted by the COVID-19 pandemic, which first impacted the United States in March 2020. In particular, it is clear that in the first three months of the pandemic, Employer’s business was impacted. Even still, Employer’s off-peak months of February 2019, January 2020, and February 2020 saw truckloads on par with Employer’s peak months of April 2019, December 2019, and December of 2020. Thus, at minimum, the inclusion of April and December in peak season seems arbitrary. Additionally, with only one “normal” year’s worth of records to establish a peak season, it is difficult to determine whether Employer is asserting a seasonal need or a need due to the national shortage of drivers.

Employer also submitted its 2019 and 2020 payroll reports to attempt to establish its seasonal need. Employer claimed that it has struggled to maintain a workforce as large as its 2019 workforce, blaming the national shortage of truck drivers. Employer claimed to have eleven full-time drivers and three subcontractors in August 2019, compared to seven full-time drivers and two subcontractors in August 2020. However, that is not reflected in Employer’s payroll reports. Employer’s August 2019 payroll report lists eleven drivers as permanent, full-time drivers. However, four of those drivers submitted hours lower than full-time work; three drivers reported working fewer than 40 hours total, and another driver reported working only 120.75 hours total. Although those four drivers are listed as full-time drivers, they are reportedly not working full time and no explanation was given for the discrepancy. Thus, Employer only had seven drivers working full-time in August 2019, which is equivalent to the number of drivers it had working full time in August 2020. With some drivers working less than full time during peak season, it does not appear that the need (or desire) for more drivers is tied to the particular season.

Employer’s evidence also does not support its alleged need for 15 drivers as required by 20 C.F.R §§ 655.11(e)(3) and (4). The CO correctly stated that Employer’s payroll reports do not provide any information regarding the number of hours or truckloads delivered, which makes it difficult to determine the workload of temporary workers and subcontractors. In its request for administrative review, Employer stated that it based its request for 15 drivers off of the experience of one of the governors of Employer. Mere experience, without any evidence to support that figure, is not enough to establish that Employer needs 15 drivers. Therefore, I find that even if Employer had successfully established a seasonal need, its purported need for 15 drivers is arbitrary.

In conclusion, I find that the CO’s determination that Employer has neither established a temporary, seasonal need, nor a need for 15 long haul truck drivers is supported by the evidence in the record.

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ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer’s denial of labor certification in the above-captioned matter is AFFIRMED.

SO ORDERED.

LARRY W. PRICE
Administrative Law Judge

LWP/KRS/jcb
Newport News, VA